Public Prosecutor v Abdul Rahim bin Kalandari Mustan

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–70 OF 2002 (P) AND 05–68–2002 (P)
RICHARD MALANJUM, CJ (SABAH & SARAWAK), ARIFIN ZAKARIA AND HASHIM YUSOFF FCJJ
13 MAY 2008

Criminal Law — Dangerous Drugs — Trafficking — Conviction and sentence — Appeal against — Presumption of trafficking invoked upon presumption of possession — Whether Court of Appeal erred in reducing conviction to charge of possession only — Whether conviction for trafficking could be sustained despite misdirection by trial judge when he applied in sequence two presumptions under ss 37(d) and 37(da) of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 ss 2, 37(d), 37(da)

When the police raided a house in Penang, the house was occupied by one Abdul Rahim bin Kalandari Mustan, the accused and another Indonesian female. After an initial search of the ground floor kitchen the police questioned the accused as to where he kept the drugs. The accused allegedly replied on 'the first floor', whereupon the police proceeded to search the first room on the first floor and discovered two plastic bags each containing leafy materials which were later confirmed to be 39,105g of cannabis. The accused was thus charged with the offence of trafficking in a dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), convicted and sentenced to death by the High Court. On appeal, the Court of Appeal found that the High Court trial judge had misdirected himself by invoking the double presumptions against the accused to find him guilty of trafficking. Accordingly the accused was found guilty of possession only and sentenced to 18 years imprisonment and ten strokes of the rotan. This was the prosecution's appeal against the decision of the Court of Appeal and the accused's cross-appeal against the substituted conviction and sentence. The prosecution submitted that despite the misdirection in law by the trial judge, the evidence when considered in totality and cumulatively affirmatively showed that the accused was in possession of the drugs without resorting to the statutory presumption under s 37(d) of the DDA. As an alternative argument the prosecution submitted that having invoked the presumption of possession under s 37(d) of the DDA, the Court of Appeal failed to consider

further that the act of the accused in keeping the large quantity of drugs in his rented house would be enough to constitute direct evidence of trafficking, under s 2 of the DDA, without resorting to the presumption under s 37(da) of the DDA. In the cross-appeal the accused argued that the respondent could not have been in sole care and control of the house where the drugs were found because his evidence was that there was one Nasir who lived in that house with him. As such, the accused also submitted that s 2 of the DDA should not be relied upon to establish trafficking. The vital point for consideration in this appeal was whether the Court of Appeal erred in allowing the appeal and whether a conviction for trafficking could be sustained notwithstanding the misdirection by the trial judge when he applied in sequence the two presumptions under ss 37(d) and 37(da) of the DDA.

Held, dismissing the appeal by the prosecution and the cross-appeal by the accused and affirming the conviction and sentence imposed by the Court of Appeal:

(1) Although the trial judge expressed his doubts on the explanations given by the accused on the evidence adduced by the prosecution, such as the renting of the house and the changing of the locks, he did not come to a firm factual finding of actual possession. Instead he invoked the presumption under s 37(d) of the DDA. As such, an appellate court should be slow and cautious in reversing a factual finding which the trial judge who was in a better position to do did not make. Although this present case has some similarities with the case of *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 7 ('*Haryadi*'), unlike *Haryadi*'s case the trial judge in this case had the opportunity to consider the evidence for actual possession yet did not make such a finding. Further, the accused in this case had not made any attempt to escape an overt act (see paras 36, 37, 46 & 50).

(2) Again in the case of trafficking, the trial judge did not refer to the definition of trafficking in s 2 of the DDA or make any affirmative factual finding of trafficking by the accused but relied on the presumption in s 37(da) instead. This court being an appellate could not now make an actual finding of trafficking within the meaning assigned under s 2 of the DDA when the trial judge with the same evidence did not do so (see paras 39–41).

(3) The view expressed by the Federal Court in a previous case was that whether a person is a trafficker 'depends on the facts and circumstances

of the given case, including the quantity of drugs and any transaction the accused proposed to enter into'. In the present case there was nothing at all to indicate any proposed transaction of any sort. Therefore with these facts, it was very clear that that had the trial judge properly directed himself, he would also have come to the same finding (see para 44); *Mohamad Yazri bin Minhat v Public Prosecutor* [2004] 2 MLJ 241 distinguished.

(4) There was one further point of some importance which was on the issue of fairness to the accused. In the circumstances of the present case, in which the trial judge applied in sequence the two presumptions under ss 37(d) and 37(da) of the DDA and the accused presented his case along those lines, it would not have been appropriate for the Court of Appeal to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 to uphold the conviction and sentence notwithstanding the misdirection by the trial judge (see paras 51–53).

[Bahasa Malaysia summary

Semasa pihak polis membuat serbuan ke atas sebuah rumah di Pulau Pinang, rumah tersebut didiami oleh seorang yang bernama Abdul Rahim bin Kalandari Mustan, tertuduh dan seorang perempuan Indonesia. Selepas pemeriksaan awal di dapur di tingkat bawah, polis bertanya kepada tertuduh di mana beliau menyorokkan dadah. Tertuduh kemudiannya menjawab di 'tingkat satu', lalu pihak polis meneruskan penggeledahan di bilik pertama tingkat satu dan menjumpai dua beg plastik mengandungi bahan-bahan berdaun yang kemudiannya disahkan sebagai 39,105g ganja. Tertuduh kemudiannya dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), telah disabitkan dan dihukum mati oleh Mahkamah Tinggi. Semasa rayuan, Mahkamah Rayuan mendapati bahawa hakim bicara Mahkamah Tinggi telah tersalah arah dengan menggunapakai anggapan berganda terhadap tertuduh dan mendapatinya bersalah kerana mengedar. Oleh sebab itu tertuduh telah didapati bersalah terhadap milikan sahaja dan dihukum 18 tahun penjara dan 10 sebatan. Ini merupakan rayuan pendakwaan terhadap keputusan Mahkamah Rayuan dan rayuan balas tertuduh terhadap sabitan gantian dan hukuman. Pendakwaan berhujah bahawa walaupun terdapat salah arah perundangan oleh hakim bicara, keterangan setelah dipertimbangkan keseluruhannya dan kesemuanya secara jelas menunjukkan bahawa tertuduh memiliki dadah tanpa perlu menggunakan anggapan di bawah s 37(d) ADB. Sebagai alasan alternatif pendakwaan menghujahkan bahawa dengan menggunapakai anggapan milikan di bawah s 37(d) ADB, Mahkamah Rayuan selanjutnya gagal mempertimbangkan bahawa tindakan tertuduh

menyimpan dadah dalam kuantiti yang banyak di dalam rumah sewanya adalah mencukupi bagi membawa bukti jelas pengedaran, di bawah s 2 ADB, tanpa perlu merujuk kepada anggapan di bawah s 37(da) ADB. Dalam rayuan balas tertuduh berhujah bahawa responden saja tidak boleh dikatakan dalam jagaan dan kawalan rumah di mana dadah dijumpai kerana keterangannya, terdapat seorang yang bernama Nasir juga tinggal di dalam rumah tersebut bersama-sama dengannya. Oleh itu, tertuduh juga berhujah bahawa s 2 ADB tidak boleh digunakan bagi membuktikan pengedaran. Perkara penting untuk dipertimbangkan dalam rayuan ini adalah sama ada Mahkamah Rayuan telah terkhilaf dalam membenarkan rayuan dan sama ada sabitan untuk pengedaran boleh dipertahankan walaupun salah arah oleh hakim bicara apabila beliau menggunapakai secara berturutan dua anggapan di bawah ss 37(d) dan 37(da) ADB.

Diputuskan, menolak rayuan oleh pendakwaan dan rayuan balas oleh tertuduh dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Rayuan:

(1) Walaupun hakim bicara menzahirkan keraguan-keraguannya terhadap penjelasan yang diberikan oleh tertuduh di atas keterangan yang dikemukakan oleh pendakwaan, seperti penyewaan rumah dan pertukaran kunci-kunci, beliau tidak menjurus kepada penemuan fakta yang kukuh untuk milikan sebenar. Sebaliknya beliau menggunapakai anggapan di bawah s 37(d) ADB. Oleh sebab itu, mahkamah rayuan hendaklah berjaga-jaga dan berhati-hati untuk menukar penemuan fakta yang mana hakim bicara adalah dalam keadaan yang lebih baik pun enggan melakukannya. Walaupun dalam kes sekarang ini mempunyai persamaan dengan kes *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 7 ('*Haryadi*'), tidak seperti kes *Haryadi* hakim bicara dalam kes ini mempunyai peluang menimbang keterangan bagi milikan sebenar tetapi tidak membuat keputusan tersebut. Seterusnya, tertuduh dalam kes ini tidak membuat sebarang cubaan mengelak tindakan yang berlebihan (lihat perenggan 36, 37, 46 & 50).

(2) Juga dalam kes pengedaran, hakim bicara tidak merujuk kepada tafsiran pengedaran dalam s 2 ADB atau membuat penemuan fakta sebenar mengenai pengedaran oleh tertuduh tetapi sebaliknya bergantung ke atas anggapan dalam s 37(da). Mahkamah ini yang merupakan mahkamah rayuan tidak boleh membuat penemuan sebenar pengedaran dalam maksud yang diperuntukkan di bawah s 2 ADB apabila hakim bicara dengan bukti sama tidak pula melakukannya (lihat perenggan 39–41).

(3) Pendapat yang dizahirkan oleh Mahkamah Persekutuan dalam kes sebelum ini adalah sama ada seseorang adalah pengedar 'bergantung

kepada fakta-fakta dan keadaan-keadaan dalam kes yang diberikan, termasuk kuantiti dadah dan sesuatu urusniaga yang tertuduh rancang akan dibuat'. Dalam kes sekarang ini tiada apa-apa pun yang menunjukkan perancangan urusniaga yang seumpama dengannya. Oleh itu dengan fakta-fakta ini, ia adalah jelas bahawa jika hakim bicara tepat pada haluannya, beliau juga akan mendapat keputusan yang sama (lihat perenggan 44) (*Mohamad Yazri bin Minhat v PP* [2004] 2 MLJ 241 dibeza).

(4) Terdapat satu fakta penting lagi iaitu isu keadilan kepada tertuduh. Dalam keadaan-keadaan dalam kes ini, yang mana hakim bicara menggunakan secara berturutan dua anggapan di bawah ss 37(d) dan 37(da) ADB dan tertuduh telah mempersembahkan kesnya berdasarkan anggapan-anggapan itu, adalah tidak sesuai bagi Mahkamah Rayuan untuk menggunapakai peruntukan s 60(1) Akta Mahkamah Kehakiman 1964 bagi menyokong sabitan dan hukuman meskipun salah arah oleh hakim bicara (lihat perenggan 51–53).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71 (folld)
Kesavan a/l Petchavo (@) Balakrishnan v PP [2003] 2 MLJ 209 (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46 (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241 (distd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193 (distd)
PP v Chan Peng Fatt [2000] 1 MLJ 179 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60, 60(1)
Dangerous Drugs Act 1952 ss 2, 6, 37, 37(b) 37(d), 37(da), 37(da)(vi), 37(g), 39A, 39A(2), 39B, 39B(1)(a)

Appeal from: Criminal Appeal Nos P-05–51 of 1997 and 05–51 of 1997 (Court of Appeal, Putrajaya).

Mangaiarkarasi Krishnan (Nurulhuda Nur'aini bt Mohd Noor with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Karpal Singh (Jagdep Singh Deo with him) (Karpal Singh & Co) for the respondent.

Richard Malanjum CJ (Sabah & Sarawak):

INTRODUCTION

[1] The respondent was charged and convicted for trafficking 39,105g of cannabis by the Penang High Court on 9 July 1997. He was sentenced to death as required by s 39B of the Dangerous Drugs Act 1952 ('the Act').

[2] On appeal to the Court of Appeal the conviction was substituted for possession under s 6 of the Act which is punishable under s 39A(2) of the same Act. The respondent was sentenced to 18 years imprisonment and ordered to undergo ten strokes of whipping.

[3] The prosecution now appeals before this court against the decision of the Court of Appeal. The respondent is cross-appealing against the substituted conviction and sentence.

[4] We heard the submissions by the learned deputy public prosecutor and learned counsel for the respondent. We note that the issues addressed before us are similar to what were canvassed before the Court of Appeal. Except for one issue, that is, on the application of the presumptions pursuant to ss 37(d) and 37(da) of the Act by the learned trial judge, the Court of Appeal did not find sufficient merits on the rest of the issues raised.

[5] With respect, we are inclined to take a similar approach in this appeal. We agree with the reasons given by the Court of Appeal that except for the one issue, that is, on the application of double presumptions by the learned trial judge, the other issues brought up do not have any or sufficient merits. But first the brief background facts of this present appeal.

BRIEF BACKGROUND FACTS

[6] On 4 July 1996 at about 8.15am. Chief Inspector Teoh (PW4) led a team of police officers to conduct a raid at a house No 6 Tingkat Mas, Green Lane, Penang. PW4 divided the officers with him into two groups. One group was directed to guard the back portion of the house while the other led by PW4 climbed over the front gate and entered the house.

A [7] PW4 found the grill and the front wooden door locked. He thus knocked at the door and the respondent who had only a towel on him opened it. PW4 then introduced himself as a policeman to the respondent. Subsequently on the instruction of PW4 the grill was opened by the respondent and during which time PW4 saw a woman (PW6) running away
B towards the bathroom. She was pursued by PW7 and was brought back to the living room.

[8] PW4 then checked the identity card of the respondent and the Indonesian passport of PW6. PW4 then proceeded to inspect the kitchen
C which was on the ground floor of the house. He found inside the kitchen cabinet one weighing scale of 'Kwonnie' brand and two plastic packages. One plastic package contained two roles of cellophane tape and another contained plastic bags of various sizes.

D [9] Having found those items PW4 asked the respondent: 'Di mana kamu simpan dadah? (Where did you keep the drugs?)'. The respondent replied: 'Di tingkat atas (the first floor)'. This particular event was challenged by the respondent but the High Court judge was satisfied beyond reasonable doubt that the event did take place.

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[10] PW4 then instructed the respondent to take him and his group to the first floor. Everyone went up including PW6. The respondent brought them to the front room upstairs (No 1 room). The door of the room was opened a little with its key hanging from the knob keyhole. Inside the room the
F respondent pointed to the dressing table which was in front of the wall cupboard.

[11] PW4 then instructed PW7 to push the dressing table to access to the cupboard. On opening the cupboard PW4 found two plastic bags each
G containing leafy materials which were later on determined to be cannabis the subject matter of the charge preferred against the respondent. Subsequently the respondent and PW6 were handcuffed. The investigation officer (PW11) then came to the house to investigate including taking photographs of the place. On completion of those tasks the respondent and PW6 together with
H the bags recovered containing the offensive materials were taken to the police station.

FINDINGS OF THE HIGH COURT

I [12] In his judgment the learned trial judge made several findings. However, since we are inclined to consider only the one issue as indicated above the relevant findings are thus:

(a) he was satisfied beyond reasonable doubt that the respondent did answer the question of PW4 on where he kept the drugs;

(b) he ruled that the materials found inside the two bags were cannabis as defined under the Act;

(c) he was satisfied beyond reasonable doubt that the respondent had the exclusive control of the house at the material time;

(d) he was satisfied beyond reasonable doubt that the respondent had the custody and control of the two bags containing the drugs hence he applied the presumption of possession under s 37(d) of the Act;

(e) as the total weight of the cannabis found was 39,105g he also applied the presumption of trafficking under s 37(da);

(f) as the respondent had the care and management of the premises and thus making him the occupier — s 37(b) of the Act and as the dangerous drugs was found concealed in the premises the learned Judge held that the said drugs was concealed with the knowledge of the occupier — s 37(g);

(g) he ruled that the evidence of knowledge of the respondent on the presence of the drugs in the premise could also be inferred from the answer he gave to PW4 and with him pointing to the cupboard where the drugs was found; and

(h) the version of the respondent about one Nasir who lived in the house shortly prior to the raid was fictitious.

BEFORE THE COURT OF APPEAL

[13] While the Court of Appeal agreed with the reasons given by the learned trial judge in coming to his findings on the issues advanced during the trial, the court found it as an error of law on the part of the learned trial judge to have invoked both the presumptions in ss 37(d) and 37(da) of the Act in finding the respondent guilty of trafficking.

[14] Indeed on the specific issue the Court of Appeal was of the view that where the element of possession of drugs is premised on the presumption under s 37(d) of the Act it is not permissible in law to subsequently find a person guilty of trafficking under the Act by simply applying the presumption under s 37(da) thereof. There must be a positive finding of actual possession as a prerequisite. The Court of Appeal found that the learned trial judge felled into that error as he did not make any positive finding of fact as to possession of the drugs by the respondent before relying on the presumption of trafficking.

[15] In fairness to the learned trial judge the principle against the use of double presumptions did not arise then when he made his decision in the

present case. However, the principle has to be accepted as the law prevailing owing to its retrospective effect. (See, *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298).

[16] Meanwhile, the Court of Appeal was of the view that since it was the finding of the learned trial judge that the prosecution had established with the aid of the presumption under s 37(d) the element of possession of the drugs beyond reasonable doubt, the respondent was therefore guilty of the offence of possession under s 6 and punishable under s 39A of the Act.

BEFORE THIS COURT

[17] Before us several grounds of appeal were submitted by the appellant and by the respondent in his cross-appeal.

[18] However, the summary from the grounds (grounds 1, 3, 4 and 5) advanced by the appellant is as submitted by the learned deputy public prosecutor, namely, that notwithstanding the misdirection in law by the learned trial judge when considered in totality and cumulatively the evidence adduced at the trial the prosecution had affirmatively shown that the respondent was in possession of the drugs without resorting to s 37(d) of the Act. The learned deputy listed the evidence thus:

(i) the renting of the house by the respondent eight months before his arrest;

(ii) the changing of the locks;

(iii) the presence of the respondent alone with PW6 at the time of the raid;

(iv) the statement that the drugs were upstairs of the house; and

(v) the act of pointing to the cupboard where the drugs were found.

[19] As an alternative argument the learned deputy submitted that (grounds 6, 7 and 8) having invoked the presumption of possession under s 37(d) the Court of Appeal failed to consider further that the act of the respondent in 'keeping' the large quantity of drugs in his rented house and bearing in mind the definition of trafficking under s 2 of the Act would be enough to constitute direct evidence for trafficking without resorting to the presumption in s 37(da).

[20] Learned counsel for the respondent submitting in response to the appeal by the appellant and cross-appeal by the respondent (ground 1 (a), (b), (c), (d) and (e)) argued that the respondent could not have been in sole care

and control of the house where the drugs were found. He pointed out there were evidence which indicated otherwise. As for the reliance on s 2 of the Act learned counsel argued that it should not be relied upon to establish trafficking and he cited on the case of *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337.

[21] We have considered the evidence, the grounds of appeal and cross-appeal and the respective submissions by the parties. We find no reason to disagree with the reasons and the conclusions arrived at by the Court of Appeal in respect of the issue on care and control of the house and the other issues related to it as advanced. Accordingly, we do not think it is necessary for us to deal with them in any greater details.

[22] The only remaining but vital point for us to consider is whether the Court of Appeal erred, as contended by the learned deputy public prosecutor, in allowing the appeal against the conviction for trafficking by simply adopting the prohibition against the application of double presumption without further appreciation of the available evidence adduced.

[23] It is obvious from the decision of the Court of Appeal that it strictly followed the principle enunciated in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. In that case the interpretation of ss 37(d) and 37(da) of the Act became an issue. The provisions read:

> Section 37
>
> In all proceedings under this act or any regulation made thereunder —
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of —
>
> (vi) 200 grammes or more in weight of cannabis,
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[24] After due consideration on the relevant words employed in the provisions the Federal Court stipulated the following:

(i) that the word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s 37(d);

(ii) that 'to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37 (da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused'; and

(iii) that such approach does not cause any 'injustice to the prosecution'. 'In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

[25] In summary, this court held that the presumptions in ss 37(d) and 37(da) should not be applied together or in sequence to find an accused person guilty for trafficking of drug under the Act. Indeed on closer reading of what was stated by this court in *Muhammed bin Hassan* it is clear that if the presumption of trafficking is to be invoked there must first be a factual finding of possession. The following statement supports this conclusion: 'where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming *to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking* under the said s 37(da) which, of course, is rebuttable.' (Emphasis added.)

[26] Subsequent cases upheld the law as pronounced by this court resulting in convictions for trafficking being set aside and substituted for possession where there were applications of double presumptions by the trial judges. (See, *Kesavan a/l Petchavo (@) Balakrishnan v Public Prosecutor* [2003] 2 MLJ 209 CA; *Public Prosecutor v Chan Peng Fatt* [2000] 1 MLJ 179). The principle as laid down in *Muhammed bin Hassan* was reaffirmed in *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685.

[27] Meanwhile, the prosecution has been advancing varieties of argument in order to circumvent the apparent huddle imposed due to the interpretation of the 11 provisions. It has not been quite successful. However, in the case of

Public Prosecutor v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193 this court had an opportunity to further scrutinise the prohibition on the use of double presumptions. In that case the accused was arrested while travelling in a taxi. He had in him small packets containing heroin which were tucked in his waist, the right and left side pockets of his truck top and in his trousers pockets. He was thus charged for the offence of trafficking in dangerous drug under s 39B(1)(a) of the Act. He was convicted and sentenced to death by the High Court. On appeal the Court of Appeal found that the High Court trial judge misdirected himself by invoking the double presumptions against the accused to find him guilty for trafficking. Accordingly the accused was found guilty for possession only and sentenced to 16 years imprisonment and ten strokes of the rotan. The prosecution appealed to this court against the decision of the Court of Appeal. In its judgment this court proceeded to restate the principle thus:

(i) the decision in *Muhammed bin Hassan* only prohibits the use of double presumptions under ss 37(d) and 37(da) of the Act;

(ii) it is 'open to the prosecution to rely on either of the presumptions';

(iii) 'the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support a charge under s 39B of the act; and

(iv) alternatively, 'the prosecution may rely on the presumption under s 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s 37(da) that the accused was in fact trafficking in the dangerous drug.

[28] Bearing in mind the above principles this court held that the accused should have been found guilty of trafficking by the Court of Appeal despite the misdirection by the trial High Court judge. The reasons given are these:

(i) the trial court found and which was affirmed by the Court of Appeal that the accused was having the custody and control of the drug at the material time. The presumption under s 37(d) was thus invoked and the accused was deemed to be in possession of such drug. The accused failed to rebut the said presumption;

(ii) it was not in dispute that when the accused was arrested he was in fact carrying the drug;

(iii) by definition 'trafficking' includes 'carrying'. But carrying alone is insufficient to constitute the offence of trafficking. Other elements should be considered such as the amount of drug in possession and the manner of possession;

(iv) judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that' the accused 'was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption;

(v) the defence of the accused was 'a mere denial that the drug was ever found on him'. The trial judge rejected it. Accordingly the court was satisfied that the accused was not just a passive carrier. Hence with such facts the court was satisfied that 'had the learned trial judge properly directed himself, he would nonetheless have come to the same finding'; and

(vi) in the circumstances, the court held 'that the Court of Appeal ought to have applied the proviso to s 60(1) of the CJA and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge.

[29] In passing we note that for the offence of trafficking to be punishable as provided the Act prescribes certain prerequisites, namely:

(i) that an accused has to be found in possession which include knowing the nature of the thing possessed, a vital element for the ingredient of possession;

(ii) that the quantity of drug found in possession must at least meet the statutory minimum amount specified depending on the nature of the drug found in possession; and

(iii) that the possession is otherwise than in accordance with the authority of the Act or any other written law.

[30] In our view the prerequisites stipulate that to secure a conviction for trafficking it is not permissible to rely on the presumption under s 37(d) itself. Indeed that seems to be the indication from the judgment in *Muhammed bin Hassan* by this sentence:

> In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

[31] In respect of the reliance on s 2 of the Act in relation to the element and proof of trafficking we find the discourse on the issue by the Court of Appeal in the case of *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46 enlightening and persuasive.

[32] Be that as it may, the learned deputy urged us to follow the decision in *Abdul Manaf*. However, it should be noted that no two cases are the same particularly on the facts. Further, *Abdul Manaf* did not at any stage ignore the principle in *Muhammed bin Hassan*. Rather, it clarified the principle and came to a decision as guided by the facts as found by the trial judge.

[33] Now, the issue that confronts us in the present case is whether on the facts and evidence as found by the learned trial judge and bearing in mind the principle in *Muhammed bin Hassan* a conviction for trafficking can be sustained notwithstanding the misdirection by the learned trial judge when he applied in sequence the two presumptions under ss 37(d) and 37(da) of the Act.

[34] We will first consider whether a factual finding of possession from the evidence adduced could have been arrived at by the learned trial judge without resorting to the presumption under s 37(d). The learned deputy submitted that the prosecution had affirmatively shown that the respondent was in possession of the drugs. But with respect it is in the forefront of our mind 'that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court'. (See, *Public Prosecutor v Mohd Radzi bin Abu Bakar*.

[35] Despite having the evidence before him which the learned deputy submitted to be sufficient to show actual possession the learned trial judge did not make any unequivocal finding of actual possession of the drugs. He resorted to the presumption under s 37(d) to hold that the respondent was in possession of the drugs. He said this:

> ... saya berpuashati melampau keraguan yang munasabah bahawa tertuduh mempunyai kawalan eksklusif ke atas rumah itu pada masa berkenaan. Dalam keadaan kes ini saya berpuashati melampau keraguan yang munasabah bahawa tertuduh mempunyai jagaan dan kawalan ('custody and control') kedua-dua beg yang mengandungi dadah itu dan oleh itu anggapan (d) s 37 Akta Dadah Berbahaya 1952 berbangkit.
>
> ... berdasarkan keseluruhan keterangan dalam kes ini, setakat ini, saya berpuashati melampau keraguan yang munasabah bahawa tertuduh mempunyai kawalan dan jagaan beg-beg itu yang membangkitkan anggapan milikan (possession) terhadapnya.

(Translation:... I am satisfied beyond reasonable doubt that the accused had the exclusive control of the house at the material time. In this case I am

satisfied beyond reasonable doubt that the accused had the custody and control of both begs containing the drugs hence the presumption (d) of s 37 Dangerous Drugs Act 1952 arises.

.... based on the evidence as a whole in this case, for now, I am satisfied beyond reasonable doubt that the accused had the control and custody of those begs which give rise to the presumption of possession against him).

[36] Having perused the pieces of evidence as highlighted by the learned deputy to be evidence of actual possession we do not think we can safely say that we are in a better position than the learned trial judge who did not make such actual finding.

[37] Indeed, having made his thoughts known on some of the evidence adduced, for instance, on the renting of the house and the changing of the locks and having expressed his doubts on the explanation given by the respondent, still the learned trial judge did not come to a firm factual finding of actual possession. Instead he invoked the presumption under s 37(d). That being the case and this court being an appellate court should be very slow, cautious and unless for very good reason in making a factual finding which in the first place the learned trial judge did not do so.

[38] The learned deputy then submitted an alternative argument. She argued that the reliance on the presumption under s 37(d) should not preclude this court from making an affirmative factual finding of trafficking by the respondent thereby returning the conviction for trafficking.

[39] However, on the issue of trafficking the approach taken by the learned trial judge was brief. In his judgment he did not refer to the definition of trafficking in s 2 of the Act. He relied on s 37(da) and discussed briefly on the other relevant presumptions in s 37. This is what the learned trial judge said in relation to the issue of trafficking:

> Tidak terdapat sedikit keraguan pun bahawa daun-daun kering yang ditemui itu adalah cannabis seperti yang ditakrifkan oleh Akta itu dan beratnya ialah 39,105g. Oleh itu anggapan di bawah perenggan (da) terpakai.

(Translation: There is not a slightest doubt that the dry leaves that were found were cannabis as defined by the Act and the weight is 39,105g. As such the presumption under para (da) applies).

> Melihat dari satu segi lagi, tertuduh mempunyai 'care and management' premis tersebut dan, oleh itu, adalah penghuni (occupier) premis itu — s 37(b). Oleh sebab dadah berbahaya itu ditemui tersorok (concealed) dalam premis itu, dadah itu adalah disorok dengan pengetahuan penghuni itu — s 37(g). Memanglah ini cuma membangkitkan anggapan mengenai pengetahuan yang boleh diandaikan

daripada jawapan tertuduh kepada soalan PW4 dan bahawa dia menunjuk ke arah almari dinding itu. Tetapi, seperti yang saya telah sebutkan, berdasarkan keseluruhan keterangan dalam kes ini, setakat ini, saya berpuashati melampau keraguan yang munasabah bahawa tertuduh mempunyai kawalan dan jagaan beg-beg itu yang membangkitkan anggapan milikan (possession) terhadapnya.

(Translation: Looking from another angle, the accused had the 'care and management' of the premises and, because of that, he is an occupier (occupier) of the premises — s 37(b). Since the drugs were found concealed (concealed) inside the premises the drugs were concealed with the knowledge of the occupier — s 37(g). Of course this involves only presumption as to knowledge but what strengthens the evidence regarding knowledge can be inferred from the answer of the accused to the question of PW4 and that he pointed to the direction of the wall cupboard. But, as I have mentioned, based on the overall evidence in this case, for now, I am satisfied beyond reasonable doubt that the accused had the control and custody of the begs which gives rise to the presumption of possession (possession) against him).

[40] The learned trial judge did conclude that the dry leaves found concealed in the house were cannabis weighing 39,105g which is far beyond the presumed 200g for trafficking. He also discussed the evidence and elements which made the respondent the occupier of the house and of his presumed knowledge about the concealed drugs being the occupier. But he did not make any affirmative factual finding of trafficking by the respondent. In any event such exercise would have been contrary to the prerequisites stated in *Muhammed bin Hassan* alluded to earlier on in this judgment.

[41] Yet the learned deputy urged us to do exactly what the learned trial judge did not do even with the same evidence before him. We do not think we are in a much better position than the learned trial judge. This is not a case of where the respondent made a bare denial on the presence of the drugs in the house. His evidence was that there was one Nasir who had lived there with him. No doubt the learned trial judge did not believe the story. But still he did not make any factual finding of trafficking within the meaning assigned under s 2 of the Act, a section which did not come for consideration by him in his judgment.

[42] Indeed in his concluding remarks the learned trial judge said this:

Kesimpulannya saya dapati bahawa pembelaan telah tidak berjaya membangkitkan apa-apa keraguan yang munasabah terhadap kes pendakwaan. Pembelaan juga tidak berjaya menyangkal anggapan-anggapan yang berbangkit atas imbangan kemungkinan. Maka saya dapati tertuduh bersalah seperti pertuduhan, mensabitkannya dan menjatuhkan hukuman mati mandatori.

(Translation: Overall I find that the defence has failed to cast any reasonable doubt on the prosecution case. The defence also failed to rebut the relevant presumptions on the balance of probabilities. Hence, I find the accused guilty as charged, convict him and punish him with mandatory death sentence).

[43] At any rate, being an appellate court and bearing in mind the restraint imposed upon it when coming with a new, different or upsetting any factual findings by the courts below, we are of the view that it would be grossly unfair to the respondent if we were to, at this final appeal stage, invoke s 2 and review such other evidence which were before the learned trial judge to come to a factual finding that there was trafficking of the drugs. We therefore decline to accede to the request by the learned deputy.

[44] We are also very conscious of the view expressed by the Court of Appeal and upheld by this court in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241. It is said that whether a person 'is a trafficker in those circumstances' (that is, transporting a quantity of drugs from one point to another) 'depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into'. In the present case there is nothing at all to indicate any proposed transaction of sort.

[45] The factual circumstances in this present case can also be quite easily distinguished from that of *Abdul Manaf*. There, the defence was a bare denial even though the drugs, heroin, were found in small packets tucked in his waist, the right and left side pockets of his track top and in his trousers pockets. Further, it is not indicated in the judgment whether the trial judge had the opportunity to consider the evidence on factual finding. In the present case the learned trial judge discussed the evidence before him and made some observations or inferences on them. In other words he did direct his mind on the nature of the evidence before him. Yet in the final analysis he did not make any factual finding for trafficking. He relied on the presumption under s 37(da) to find trafficking by the respondent. We do not think we can say in this case as was said in *Abdul Manaf* that armed 'with these facts, we are satisfied that had the learned trial judge properly directed himself, he would nonetheless have come to the same finding'.

[46] We find that this present case has some similarities with that of the case of *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71. In that case the police raided a house and went to the makeshift and roofless bathroom to find the accused in the process of rolling ganja and sitting cross-legged with an aluminium pot containing ganja leaves on his lap. When he realised that the police was there the accused ran inside the house but only to run out

again and crashed through the bathroom wall. He was eventually cornered and arrested. Search was then conducted in the bathroom by the police and found a package containing 600 rolls of ganja in one corner and another package containing a slab of ganja was recovered under a lamp. The accused was convicted by the High Court for trafficking. The trial judge found that the accused failed to raise any reasonable doubt of the prosecution's case on the balance of probabilities. He also found the accused failing to rebut the two statutory presumptions invoked by him earlier. He thus concluded that from the totality of the evidence adduced, it was clear that the accused was 'trafficking 261.06g of cannabis as there was no evidence suggesting that the cannabis was for his own use'.

[47] The Court of Appeal upheld the conviction after reviewing, inter alia, the testimony of the eye witness, who saw the accused alone in the bathroom rolling the ganja leaves and fleeing when he realised that the police was around in the shophouse. the court also 'agreed with the deputy public prosecutor that the learned trial judge was justified in concluding that the appellant was in possession of the cannabis and had correctly invoked the presumption of trafficking under the Act'.

[48] On appeal to this court it was highlighted that the trial judge relied on the two presumptions to find the accused guilty of trafficking. It was also found that the trial judge held that the accused was in possession of 251.06g of cannabis. In such case this court expressed the view that it 'would have been in order if, based on the express finding of possession', the trial judge proceeded to invoke the presumption of trafficking under s 37(da) of the Act. But he did not do that. Instead the trial judge went on to find the accused 'in custody and control' of the cannabis and held that the presumption of possession under s 37(d) of the Act applied. He then went on to say that likewise because the accused was in possession of more than 200g of cannabis, the presumption of trafficking under s 37(da)(vi) of the Act applied. The trial judge also found the accused had failed to rebut the two presumptions.

[49] On such setting this court came to the conclusion that by 'making a finding of possession and then relying on the provision of presumed possession under s 37(d) of the Act, the learned trial judge had seriously misdirected himself and leaves us in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s 37(d) of the Act'. this court thus gave the benefit of doubt to the accused and proceeded to substitute the conviction with one of possession under s 6 of the Act.

[50] We are of the view that the facts and circumstances of the present case are much more favourable to the respondent. Unlike in *Harvadi bin Dadeh*

the learned trial judge in this case had the opportunity to consider the evidence for actual possession yet did not make such finding. Further, there was no evidence that the respondent made any attempt to escape, an overt act. (See, *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64) unlike in *Haryadi bin Dadeh*.

[51] There is one further point that is of some importance. It is on the issue of fairness to the respondent. In *Lim Hock Boon* the Court of Appeal made the point clear when it said this at p 53:

> The principle to be extracted from *Chia Leong Foo* is that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s 2 of the act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s 2 of the Act at the end of the case, being quite ineffective as a matter of law would be unfair and unjust to the accused.

[52] We think there is good sense in what was said by the Court of Appeal.

[53] Hence, in the present case we do not think it is safe to say that armed with the facts and circumstances, we are satisfied that had the learned trial judge properly directed himself, he would have come to the finding that the reasonable inference to be drawn is that the respondent was in fact keeping the drugs for the purpose of trafficking. As such it would not have been appropriate for the court of Appeal to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 in order to uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge.

[54] For the reasons above we dismiss the appeal by the appellant. Further, as we have indicated earlier on in this judgment, we are inclined to agree with the decision of the Court of Appeal on the conviction of the respondent for possession of the drugs. Hence we also dismiss the cross-appeal by the respondent against the conviction on the substituted offence for possession.

[55] In respect of the appeal by the respondent against the sentence imposed by the Court of Appeal we find there is no merit in it. In view of the quantity of the drugs found the sentence is appropriate in the circumstances. We therefore dismiss the appeal against sentence.

[56] Accordingly we affirm the conviction and sentence imposed by the Court of Appeal upon the respondent.

[57] My learned brothers, YA Dato' Arifin Zakaria and YA Dato' Hashim Yusoff FCJJ have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed, conviction and sentence affirmed.

Reported by K Nesan